IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMERCIAL DIVISION

No 28480 of 1988
28481 of 1988
CORAM ROGERS CJ COMM D

BRALI v HYUNDAI CORPORATION
BIAKH v HYUNDAI CORPORATION

DATE OF HEARING 21 SEPTEMBER 1988

DATE OF JUDGMENT 17 OCTOBER 1988

APPEARANCES

Plaintiff A.J.Meagher
instructed by Ebsworth & Ebsworth

Defendant D.Staff, Q.C. with J.West and M.Dempsey
instructed by Allen Allen & Hemsley

K.Mason, Q.C. for the Attorney-General
of New South Wales

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMERCIAL DIVISION)

No 28480 of 1988
No 28481 of 1988

CORAM: ROGERS CJ COMM D

17 OCTOBER 1988

BRALI v HYUNDAI CORPORATION
BIAKH v HYUNDAI CORPORATION

JUDGMENT

The plaintiffs seek enforcement in New South Wales of Interim Awards they have respectively obtained from arbitrators in the United Kingdom. Each of the plaintiffs is a limited partnership incorporated in the Kingdom of Norway. The defendant is a company incorporated in the Republic of Korea. The defendant is engaged, inter alia, in the business of shipbuilding. In 1983 each of the plaintiffs entered into a shipbuilding contract with the defendant. Each of the contracts included an arbitration clause. Disputes arose under each of the shipbuilding contracts.

On 5 April 1988 and 25 May 1988, Messrs Eckersley, Kazantzis and Short published Interim Awards in respect of the disputes between the plaintiffs and the defendant. I am informed that the amounts payable to the plaintiffs, pursuant to the two awards, total approximately $US5 million with costs estimated at one hundred and twenty three thousand pounds sterling.

The evidence shows that the plaintiffs took various proceedings in order to enforce the two awards. At the hearing, at the request of the defendant, the plaintiffs formally admitted (transcript p 2) that the awards were entered as judgments pursuant to the provisions of s 26 of the Arbitration Act, 1979 of the United Kingdom. The section provides that, by leave of the court, an award may be enforced in the same manner as a judgment to the same effect and that where leave is given, judgment may be entered in terms of the award. Not only was the admission made but Mr Meagher, counsel for the plaintiffs, is recorded (transcript p 3) as saying "I am in a position to tender the relevant certificates of judgment". After I reserved my decision, I was informed that, although leave had been granted, no judgments were actually entered pursuant to s 26. A charging order was obtained in the United Kingdom over the shares held by the defendant in its subsidiary in that country, together with a garnishee order over any debts currently due or to become due from that subsidiary to the defendant. If judgments had not, in fact, been entered, the form of the orders drawn up by the plaintiffs' English solicitors is incorrect. This has been explained as an error. The evidence adduced by the plaintiffs since the principal hearing has not been contradicted by any evidence from the defendant. Counsel for the defendant informed me

that he is not in a position to make any admissions. The probabilities are all in favour of the conclusion that, in truth, the original understanding of the plaintiffs' legal advisers in Sydney and the formal admission made by counsel was based on incorrect information. However, in the light of the conclusions to which I have come, it does not matter whether or not judgments have in fact been entered in the United Kingdom pursuant to the leave granted.

As well, garnishee orders have been obtained over the defendant's bank accounts in the United Kingdom. The High Court of Justice has ordered a director of the defendant, resident within the United Kingdom, to appear before the Court to be examined in relation to the defendant's financial position and the whereabouts of its assets.

In the Netherlands arrest orders have been obtained against three banks where the defendant has accounts. A similar order was obtained over the defendant's bank accounts in New York in the United States.

According to an affidavit sworn by the solicitor for the plaintiffs in Sydney:

> "no action has been taken in Korea on behalf of the plaintiffs as Messrs Sinclair, Roche and Temperley, the plaintiff's solicitors in London have been advised that there would be some resistance to the enforcement by

> the Korean Courts of the awards as Hyundai Corporation is an extremely large Korean trading corporation. The current political economic climate is also not conducive to such action."

I do not know whether Korea has adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("the New York Convention"). If it has done so, the material I have quoted appears somewhat startling.

The plaintiffs have each commenced proceedings in this Court, by way of Summons, for an order granting leave to enforce each of the Interim Awards in the same manner as a judgment of this Court to the same effect. Although there is registered in New South Wales a company by the name of Hyundai Australia Pty Ltd, the defendant does not have a presence in Australia. It is presumably for this reason that, rightly or wrongly, even whilst they thought that judgments had been entered in the United Kingdom, the plaintiffs took the view that they could not seek enforcement of such judgments: (cf B.P.Exploration Co (Libya) Ltd v Hunt [1980] 1 NSWLR 496, but semble Sykes & Pryles "Australian Private International Law" 2nd Ed p 118).

The rules of the New South Wales Supreme Court deal with applications under the Commercial Arbitration Act 1984 ("the State Act") in Pt 72A. Part 72A r 9 provides that proceedings under s 33(1) of the State Act for leave to enforce an award should be commenced by way of Summons. It was apparently

pursuant to that rule that the Summons in the present proceedings were filed. The plaintiffs relied upon the provisions of Pt 10 r 1(a) in effecting service of the summons upon the defendant in Korea. That provision allows for the service of originating process outside Australia where "the proceedings are founded on a cause of action arising in the State".

The defendant filed a conditional appearance in each of the actions. It also filed, in each of the actions, a motion to have service of the Summons set aside. In turn, each of the plaintiffs filed a motion for leave to proceed, presumably taking the view that the filing of only a conditional appearance enlivened the provisions of Pt 10 r 2. All the motions were heard together.

I should note that notices provided for by s 78B of the Judiciary Act, 1903 were served very late. The Solicitor-General for the State of New South Wales was good enough to be present at the hearing to tell me that, due to the shortness of time, he was unable to obtain instructions. I reserved liberty to any of the Attorneys-General who wished to make submissions to do so. The Solicitor-General for the Commonwealth sent a short facsimile. Nothing was heard from anyone else. At the hearing I took the view that the matter

could proceed because of the way the argument evolved. There was nothing that anyone could have really said on the first of the two relevant points. As to the second, it is not necessary to express a conclusion.

Although it is somewhat illogical to deal with a question of jurisdiction later in the judgment, I shall deal with the arguments in the order in which they were advanced.

Mr Staff QC, for the defendant, submitted that the application of the plaintiffs was doomed because the Interim Awards merged in the judgments obtained by the plaintiffs in the United Kingdom. He referred to the undoubted general principle that upon entry of a judgment in terms of an award under a provision such as s 26 of the United Kingdom Act, the award merges in the domestic judgment. If, in fact, merely leave to enforce the awards had been given and no judgments had been entered, the principle of merger probably would not operate even with respect to a domestic judgment. That seems to be the effect of the decision of Bingham J in The China Steam Navigation Company Ltd v Van Laun [1905] XXII TLR 26. The relevant statutory provision at the time was s 12 of the Arbitration Act, 1889. It provided that "An award on a submission may, by leave of the court, or a Judge, be enforced in the same manner as a judgment or order to the same effect". The judge appears

to have held that, notwithstanding the grant of leave, the plaintiff could bring an action and obtain judgment on the award.

Mr Meagher, for the plaintiffs, submitted that, even if entry of a domestic judgment in terms of an award does effect a merger, an award does not merge in a foreign judgment. In my opinion, this proposition is still good law in Australia today. It appears to have had its early judicial recognition in Re Henderson; Nouvion v Freeman [1887] 37 Ch D 244. Lord Justice Cotton said (p 250):

> What is required in England in order that a foreign judgment may be sued upon here as giving a good cause of action? A foreign judgment does not, in the view of an English Court, merge the original cause of action, but if the party likes to proceed here on his original cause of action, he may do so, notwithstanding the foreign judgment. If he elects to proceed on the foreign judgment, then he must shew that the matter has been adjudicated upon by a competent Court, and that the adjudication is final and conclusive."

More recently, this passage was cited and followed by Sellers J in East India Trading Co Inc v Carmel Exporters and Importers Ltd [1952] 2 QB 439 @ 442.

The principle has been recognised as anachronistic by Lord Wilberforce in Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853 where he said (p 966):

> "The appellants, arguing against issue estoppel in the case of foreign judgments, invoke a rule by which it appears that the plaintiff who has obtained a foreign

> judgment may sue here either on that judgment or on his original cause of action, a rule vouched by a number of decided cases, which maintains a precarious foothold as a sub-rule in Dicey's Conflict of Laws 7th Ed p 996. But this rule, which, if surviving at all, is an illogical survival, affords no sound basis for denying a defendant the benefit of a decision on an issue."

Perhaps prompted by the remarks of Lord Wilberforce, the United Kingdom Parliament, by s 34 of the Civil Jurisdiction and Judgments Act, 1982, provided that no proceedings may be brought in England, Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in favour of that person in proceedings between the same parties or their privies in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition. There is no such statutory provision in Australia.

In my opinion, the law, in this country, remains as set out in both Russell on Arbitration and Mustill and Boyd "The Law and Practice of Commercial Arbitration in England". Discussing the merger of an award in judgment, the editors of Russell, (20th Ed p 367) first, state the general principle that in English law, any cause of action merges in an English civil judgment thereon. The editors then go on:

> "It is so engrained in English law that the only judicial pronouncements thereon are in cases where a possible exception to the rule is being discussed. .. In particular English law makes this exception to the generality of the rule, that a foreign judgment is not accorded the power of merging and effacing the cause of action on which it was given. This is an insular quirk probably peculiar to English law, and is

so anomalous that even the most learned writers sometimes forget it."

Similarly, Mustill and Boyd say (p 374):

> "Apart from such cases, however, it would appear that the fact that the judgment has been entered on the award in a foreign court does not, unless the judgment has been satisfied, prevent the award being enforced in England. The reason is that the foreign judgment, unlike an English judgment, does not extinguish the cause of action on which it is based. This rule is, however, anomalous and it leads to the rather odd result that two regimes of enforcement with somewhat different requirements may be in existence simultaneously when judgment has been entered abroad on a 'Convention award' or a 'foreign award' - one to enforce the judgment and the other to enforce the award."

With all due respect, as will appear hereafter, this result may not be entirely anomalous.

The question is addressed in Dicey & Morris "The Conflict of Laws" 11th Ed p 564:

> "A doubt, however, arises whether an award can be enforced as such after entry of judgment on it in the foreign country. The mere fact that the claimant has taken enforcement proceedings involving entry of judgment abroad should as a matter of policy be no bar to enforcement of the award, but it is possible that the abolition of the doctrine of non merger in relation to foreign judgments may have the result that, provided the judgment is enforceable in England, then it will be the foreign judgment, and not the award, which will be enforceable in England."

In a footnote, the editors say:

> "The prior non-merger rule prevailing in relation to foreign judgments was used to justify the ability to enforce the award... It would also be odd if the provision in the Arbitration Act, 1975 s 3 that Convention awards 'shall' be enforced would not apply if judgment had been entered on the award abroad."

In support the editors cite the passage in Mustill and Boyd I have already set out. They also rely upon the decision of the New York Court of Appeal in Oil Cakes and Oil Seeds Trading Co v Sinason-Teicher Inter-American Grain Corporation 8 N.Y. 2d 852. Unfortunately, the Court merely affirmed the judgment of the court below without giving reasons.

Patchett "Recognition of Commercial Judgments and Awards in the Commonwealth" deals at length with the problem. In par 6.31 the problem is discussed that Mustill and Boyd regard as anomalous:

> "Does the beneficiary of the award have freedom to choose whether to seek registration of the award or to apply for registration of the judgment? Where a judgment has been obtained, there is no question that enforcement may be procured by registration if the scheme's criteria are met. But must the application be restricted to the latter case? ... The central issue in these cases will be whether the foreign award has merged into the foreign judgment under the conflict of laws rules of the requested State. At common law, the position is far from clear. It is recognised, with full acknowledgment of the illogicality of the rule in comparison with domestic litigation that there is no merger of the cause of action and a foreign judgment upon it. The matter has never been conclusively decided in relation to arbitral awards." (emphasis added)

As well as referring to Dicey and Morris 10th Ed p 1129, Patchett cites the decision of the Indian Supreme Court in Badat & Co v East India Trading Co [1964] AIR SC 538. He then goes on:

> "The argument of illogicality may have less force in relation to awards for which independent methods of enforcement have been provided under various schemes which would be lost if only the judgment may be relied upon."

It is this line of thought which prompted me to suggest that the rule is not entirely anomalous as suggested by Mustill and Boyd. Later in his book, dealing with the New York Convention, Professor Patchett says (par 8.26):

> "It has been argued that the Convention should apply to these awards, (that is awards under New York Convention) notwithstanding the existence of the judgment"

and cites Gaja; International Commercial Arbitration; The New York Convention (1980) p 4 and Costa and Limmerer [1976] 8 Law, Policy and International Business 737 @ 757. Patchett concludes:

> "To hold otherwise would be to deprive the beneficiary of the relatively clear and straightforward arrangements in the Convention scheme and require him instead to follow the available procedures for judgment enforcement ... The Convention was designed to run side by side with other enforcement facilities [Art VII(1)] and in principle it should remain open to the beneficiary to choose whichever course appears best to suit his interest."

Patchett is even more emphatic in par 8.38 where he expresses the view that:

> "Actions upon foreign awards at common law, or upon a foreign judgment based upon the award, proceedings for leave to enforce under the summary enforcement provisions, where such are allowed, and where applicable, applications under the judgment schemes where the award has become enforceable as a judgment or where it has been the subject of a judgment are available alternatives. Few reported decisions are to be found in relation to enforcement of foreign awards under these procedures ..."

These remarks have a bearing as well on one of the other arguments advanced by the defendant to which I will turn shortly. For present purposes, however, I conclude that, even if judgments had been entered in England, the awards would not have merged in those judgments for the purpose of enforcement in Australia. Furthermore, for the reasons assigned by Professor Patchett, I would take leave to doubt that the rule is either an illogical survival or anomalous. Certainly it did not have its genesis in the desirability of preserving alternative remedies and, in particular, preserving rights conferred by the New York Convention which recognises that an award may be more easily enforceable than a foreign judgment, but, nonetheless, it does have that beneficial effect.

The next barrier confronted by the plaintiffs is whether the Supreme Court of New South Wales has jurisdiction over the defendant. May its process properly be served on the defendant in Korea in proceedings such as the present? I have already mentioned that the plaintiffs rely upon the provisions of Pt 10(1)(a) of the Rules, to justify the service that they purported to effect on the defendant in Korea.

The argument that a cause of action arose within the jurisdiction commences by the plaintiffs pointing to the provisions of s 8(2) of the Arbitration (Foreign Awards and

Agreements) Act, 1974 ("the Commonwealth Act"). The sub-section relevantly provides that a "foreign award" may be enforced in a State as if the award had been made in that State in accordance with the law of that State. A "foreign award" is defined by s 3(1) as meaning an arbitral award, made in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies. It was not suggested that the awards here in question did not satisfy the call of the definition.

The plaintiffs therefore submit that one is directed by the provisions of s 8(2) of the Commonwealth Act to the relevant State law. Mr Meagher pointed to s 33 of the State Act as providing the plaintiffs with what he called a statutory cause of action. That section provides, by sub-section (1), that an award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award.

At this point, I should notice the provisions of Pt VII of the State Act. It is headed "Recognition and Enforcement of Foreign Awards and Agreements". That Part of the State Act with irrelevant differences, is a mirror image of the provisions of the Commonwealth Act. The Commonwealth Act

provides by s 12 that it applies to the exclusion of any provisions made by the law of a State with respect to the recognition of arbitration agreements and the enforcement of foreign awards that operate in whole or in part by reference to the Convention.

It was not suggested by anyone, including the Solicitor-General for New South Wales, and it could not properly be argued in the face of s 12 of the Commonwealth Act, that Pt VII of the State Act can conceivably be held to have valid operation. There is a clear inconsistency, within the meaning of s 109 of the Commonwealth Constitution, between the Commonwealth Act and the State Act. The Commonwealth Parliament has expressed in terms its wish to occupy the relevant field. Part VII of the State Act, although struck down as far as valid operation is concerned, by the provisions of the Constitution, does, in my view, have an impact on the construction of the other provisions of the State Act. It seems to me that, on its proper construction, s 33 of the State Act is confined to domestic awards. The State Act intended that "foreign awards" should be dealt with by the inoperative Pt VII. To that point I will return later.

For the purpose of the argument presently under consideration, the Commonwealth Act, by s 8(2), makes the foreign award completely analogous to a domestic award with respect to its enforcement. A domestic award, made in New South Wales, which is what the Commonwealth Act deems the Interim Awards to be, may ground a judgment or court order obtained in one of two ways. The person wishing to enforce the award may bring an action on the award or may follow the summary procedure in s 33(1) of the State Act. The statutory method for enforcement in s 33(1) is simply a summary procedure in lieu of the conventional action on the award (cf Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd [1985] 2 AER 436 @ 438; Mustill & Boyd [supra] p 370). Mr Meagher, without examining the authorities referred to in Mustill & Boyd, submitted that s 33(1) created a statutory cause of action. This submission cannot be sustained. On the authorities, the section merely provides a method of procedure. Mr Staff made no submissions on this point. The true question seems to me to be this; if the award had been made in New South Wales, as s 8(2) of the Commonwealth Act commands should be assumed, would such an award found a cause of action arising in New South Wales? In the absence of argument from the defendant, I am content to proceed on the hypothesis that an action may lie on an implied promise in the award itself (cf Norske Atlas Insurance Co v London General Insurance Co [1927] 43 TLR 531; Bremer

Oeltransport GmbH v Drewry [1933] 1 KB 753 @ 758 et seq; Dicey & Morris [supra] p 562). The Court does have jurisdiction to allow or to confirm service on a defendant outside the jurisdiction on a cause of action arising from an award deemed to have been made within the jurisdiction. This conclusion is consistent with one of the principal purposes of the New York Convention.

Accepting, for the purposes of this argument only, that the awards did not merge in the judgments in the United Kingdom which it was believed had been entered, the defendant next pointed to another piece of legislation in New South Wales in the Foreign Judgment (Reciprocal Enforcement) Act, 1973 ("the Foreign Judgment Act") as denying the plaintiffs the opportunity for entering judgment in this State. It was submitted that the awards fall within the purview of that Act and may not be enforced otherwise than in accordance with its provisions. It was submitted that the Foreign Judgment Act was an exclusive code for the enforcement of judgments and that, by reason of the definition of "judgment" in the Act, the awards were within its coverage.

The general problem which arises is not unique to New South Wales although the particular difficulty arising from the Commonwealth Constitution is confined to the legislation of the

Australian States. It should be noticed that to give effect to the defendant's contentions would have an effect far beyond the immediate parties. Article XIV of the New York Convention provides that "A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention". For reasons which I will mention shortly, the defendant's submission would defeat this international obligation that Australia has assumed.

The existence of such an obligation was recognised as an important factor in the approach to interpretation and application of applicable legislation by the Second Circuit Court of Appeals in Parsons & Whittemore Overseas Co v Societe Generale De L'Industrie Du Papier [1974] 508 F 2d 969. As well, a court needs to bear in mind that the New York Convention intended to bring into existence a uniform scheme for the recognition and enforcement of foreign arbitral awards. "The objective of consistency would be thwarted by the application of any other law to matters covered by the Convention" (Costa and Limmerer [supra] p 761).

In almost all the common law countries or territories which have acceded to the New York Convention, there is in force a statute modelled upon the Foreign Judgments (Reciprocal

Enforcement) Act, 1933 of the United Kingdom. The Foreign Judgment Act is the New South Wales equivalent.

Section 4(1) of the Foreign Judgment Act defines "judgment" as, inter alia, including "an award in proceedings on an arbitration (other than a foreign award enforceable by virtue of Pt VII of the Commercial Arbitration Act, 1984) if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place". Forgetting for the moment about the words in brackets in the definition, there is no doubt that the awards here in question fall within the definition of a "judgment". The words in brackets would, on their face, encompass the awards here in question, and, accordingly, exclude the awards from the scope of the Foreign Judgment Act. Unfortunately, as I have already held, the awards are not "enforceable" by virtue of Pt VII of the State Act, 1984 because that Part of the State Act has no valid operation by reason of the provisions of s 109 of the Constitution. It may be possible to read the words in question as extending to a foreign award which would be enforceable on the face of Pt VII of the State Act, were it to have any valid operation, but such a construction would certainly be straining the language. In fairness to Mr Meagher, I should say he did not make this submission.

When the Foreign Judgment Act was originally enacted in 1973, the definition of "judgment" did not include the words presently in brackets.On the same day, 8 May 1973, that the Foreign Judgment Act was assented to, the Arbitration (Foreign Awards and Agreements) Act, 1973 also received Royal Assent. By s 2, that Act was to come into force on a day to be proclaimed. However, the Act was never proclaimed. Section 8 would have amended the definition of judgment in the Foreign Judgment Act by deleting the words "and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place". In other words, foreign awards were to obtain enforceability under an Act specifically designed for that purpose. The Act not having been proclaimed in 1984, by the Foreign Judgments (Reciprocal Enforcement) (Commercial Arbitration) Amendment Act, the definition of judgment in the Foreign Judgment Act was amended by inserting in s 4(1) after the word "arbitration" the words "(other than a 'foreign award' within the meaning of s 56(1) of the Commercial Arbitration Act, 1984)". The 1984 and 1985 Amendments were passed in order to ensure that foreign awards, the subject of the New York Convention were dealt with in accordance with the requirements of the New York Convention as provided for by Part

VII of the State Act. There was a further cosmetic amendment by the Statute Law (Miscellaneous Provisions) Act, 1985 which omitted the words "a foreign award within the meaning of s 56(1)" and inserted instead "a foreign award enforceable by virtue of Part VII". Although, as I have said, it would be straining the language of s 4(1) of the Foreign Judgment Act to exclude from the definition of "judgment" any foreign award which would be enforceable under Part VII of the State Act if only Part VII were not invalidated by the Commonwealth Constitution, nonetheless, in the totality of the statutory setting that would give effect to the intentions of Parliament. It was the clear intention that foreign awards should be enforceable in accordance with the provisions of the New York Convention and not pursuant to the Foreign Judgment Act. That was clearly the intention because the defences to applications for enforcement under the Convention and the Act are much different. The intention of Parliament stands to be defeated because it was not appreciated that Part VII of the State Act could have no valid operation. However, effect can be given to the clear intention of Parliament by reading the words in the somewhat strained way I have indicated. In my view, the injunction to give legislation a purposive interpretation can best be fulfilled in this way. There is presently before the Parliament a Bill for amendment of the Foreign Judgment Act. It may be thought convenient to put the present difficulty beyond argument.

The plaintiffs submitted that s 10 of the Foreign Judgment is inoperative in so far as it is in conflict with the provisions of s 8(2) of the Commonwealth Act. This is an argument I am not prepared to consider because of the insufficient notice given under the Judiciary Act. However, it is clear that the Commonwealth Act intended that awards should be enforceable in conformity with the New York Convention and if, on its true construction, the Foreign Judgment Act works to prevent that result, then, to that extent, it would be inoperative.

Mr Meagher submitted that exclusion of the awards from the operation of the Foreign Judgment Act may be justified in a different way. Section 10 of the Foreign Judgment Act provides that no proceedings for the recovery of a sum payable under a judgment "to which Part II of the Act applies", other than proceedings by way of registration of the judgment, shall be entertained by any court in the State. Accepting, for the purposes of this judgment, that the awards here in question do fall within the definition of "judgment" in s 4, the question to be considered is whether the awards are judgments to which Pt II of the Foreign Judgment Act applies.

There is no doubt that the United Kingdom is a country relevantly within the application of the Part. What ss 5(3) and (4) additionally require, in order to make Part II applicable, is that the judgment be given in a "superior" Court. The plaintiffs argue that s 10 of the Act fails to control the enforcement of the awards because the awards cannot satisfy the requirements in s 5. The problem was referred to by Patchett (supra) when he said (p 210):-

> "In relation to the second case, rather different and difficult considerations arise since the registration process must be concerned with the award and the arbitration from which it derived. There is very little case law on this matter, probably indicating little use of the schemes in this context. This may not be surprising as the special characteristics of arbitration and awards are not clearly reflected in the statutes, which deal with the matter merely by including awards within the definition of 'judgments'. In consequence the terminology of the schemes which are drafted throughout as applying to judgments stricto sensu fits on occasions uncomfortably with awards. It must be assumed, however, that the term 'award' as used in the Acts must be substituted for 'judgment' wherever that term appears, however awkwardly that may read. So for example, the statutes refer to 'judgments given in superior courts' of reciprocating countries. In the context of awards, should this be read as a reference to awards made by an arbitral body in a reciprocating country which have, under the law of that country, become enforceable in the same manner as a judgment which has been given by any court of that country or only by a superior court of that country or only by a recognised court of that country? Presumably the first is intended. It cannot have been intended that arbitral bodies had to be designated under the 1933 Act.
>
> There seems little doubt that the criteria in the statutes must be fulfilled mutatis mutandis in respect of the award before registration can be finalised. If it had been intended that the proceedings to make the award enforceable as a judgment were to be those to

which the criteria are to be applied, rather different provision would have been made."

The question thrown up by Patchett simply was not argued by counsel and, in the light of my earlier conclusion, it is inappropriate that I express a view. Once again, if Parliament is minded to do so, clarification would appear to be highly desirable.

In the result, in my opinion, the awards given in the United Kingdom are enforceable in this State. I dismiss the defendant's motion in each action. I think I should reserve the question of costs. My inclination is to think that the plaintiffs should receive only a portion of their costs up to the time when I reserved by decision because a great deal of the argument was based on the admission by the plaintiffs from which they have since resiled. I am minded to order the plaintiffs to pay the defendant's costs subsequent to judgment being reserved and ordering that the costs be set off one against the other. The question whether final orders may now be made on the Summons also requires discussion.